

The Right Copyright Law

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This past November, the Knesset passed a new Copyright Law. The new law, which takes effect in May of this year, replaces a legal framework dating back to the Mandatory period. The new law contains many improvements, but one in particular – the fair use provision -- will ensure that Israel remains among the world's technology leaders.

Copyright law strives to promote the broad availability of literature, music, and other works by providing authors with exclusive rights over their creations while maintaining a rich public domain that allows creativity to flourish. To achieve this optimal level of copyright protection, legislators must balance the scope of rights accorded to authors with limited exceptions to those rights. Preserving this balance during a period of constant technological evolution is a daunting challenge currently confronting legislators and courts around the world.

The Knesset met this challenge by including in the new law a “fair use” provision modeled on the fair use doctrine in the U.S. Copyright Act. The Justice Ministry proposed this language in its draft copyright bill, and the Economics Committee, chaired by Moshe Kahlon, adopted the provision after extensive debate.

The provision permits the fair use of copyrighted works for purposes such as private study, research, criticism, review, news reporting, quotation, or instruction or testing by an educational institution. The provision also sets forth four nonexclusive factors to be considered in determining whether a particular use is fair.

A flexible fair use doctrine is a central feature of U.S. copyright law, which allows courts to balance the competing interests of copyright owners in protecting their expression and the public in accessing and using that expression. The U.S. Supreme Court has described fair use as an “equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”

Avoiding “rigid application of the copyright statute” is particularly important in a time of rapid technological change, when legislatures cannot possibly keep pace with product innovations. Applying the four fair use factors, U.S. courts have permitted consumers to use videocassette recorders to record television programs for later viewing. Likewise, courts have allowed search engine firms to store images from the World Wide Web in their search indices and display them in response to user queries.

At the same time, the fair use provision has not diminished the legitimate economic interests of copyright owners in the U.S. A court, for example, rejected the claim of an oil company that fair use permitted its research scientists systematically to photocopy articles in the company's library for their convenience. Similarly, a court

recently ruled that fair use did not allow a law enforcement agency to install a computer program on more computers than authorized under the license, even though only the authorized number of users would use the program at any one time.

Singapore recently adopted a U.S.-style fair use provision to replace its narrower and more rigid “fair dealing” provision based on U.K. law, as did Hong Kong (before the turnover to China) and the Philippines.

When the fair use provision was pending before the Economics Committee, sixteen U.S. entities, including Google, Yahoo!, and the American Library Association, sent a letter to Chairman Kahlon supporting enactment of the provision. These entities believe that adoption of fair use provisions in domestic copyright laws around the world is necessary for the development of a global information economy.

At the same time, U.S. entertainment interests and their Israeli affiliates opposed the fair use provision. They in essence feared that Israeli courts were not sophisticated enough to apply the fair use doctrine properly.

Fortunately, the Economics Committee had more faith in the Israeli courts, and provided the new law with the flexibility essential for a vibrant technology sector.